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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 852

MITCHELL CLIFTON ANDERSON, JOHN EDWARD SIMONDS, EARL HUBBARD, FELTON MOORE WOODWARD, MARION LUTHER ELLIS, ROBERT LEE BALLEW, JOHN DAVID QUEEN, ROBERT LEE RHODES, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

Immediately before sending our Memorandum to final print we received a copy of a brief submitted by American Civil Liberties Union, *amicus curiae*. We ask permission to submit the following comments upon it.

1. It is true that Sheriff Biggs and Agent Mann testified that Long had warned them of the dynamitings and that they took no measures to prevent

them (R. 467, 557) but together with this evidence, there should be considered the practical impossibility of patrolling on short notice the 38 miles of power lines leading into the Copper Basin (R. 467).

2. It is stated that "one of them [petitioners] was taken illegally from one state to another." Petitioner Ballew testified to that effect (R. 747). But two federal agents testified that Ballew was not arrested and went voluntarily to Copperhill to discuss the case, saying he would be glad to cooperate (R. 801–802, 806, 810–811, 814).

3. It is stated that, upon being arrested, five petitioners "were thrown into one cell seven feet by seven feet in what is known as the City jail," implying that petitioners were held there throughout this period except when they were being questioned. Not even the petitioners testified so broadly. Simonds said that on the night of his arrest "Felton Woodward, and maybe some one else" was in jail with him (R. 225). Later, Simonds testified that he spent "more than one night" with Woodward and Hubbard (R. 238–239). Woodward testified that there were four in one cell on two nights; at first he said it was Thursday and Friday, later he said it was Friday and Sunday (R. 250, 252, 264, 699–700). Hubbard testified that four of them were together Friday and Sunday nights (R. 203, cf. R. 215). Rhodes said that on Sunday night he, Woodward, Simonds, Queen

and Hubbard were placed in one cell (R. 734). That was the first night Rhodes was in custody (R. 733–734) and the only one about which he testified. Queen likewise testified that he was arrested Sunday and that five of the petitioners spent the night in a single cell (R. 681–682). But, not only is it clear that there was only one or at most two nights upon which any of petitioners were crowded in a small cell with four or five other persons; it is also certain that this Sunday night, on which, admittedly, five petitioners were crowded together, was after Woodward and Hubbard had confessed orally, and Simonds in writing; and it was the only night on which Rhodes and Ballew were held in custody prior to confessing (R. 176, 194–195, 274–275, 278–279, 285, 293, 294, 297, 323, 328, 682–684, 733–734). Moreover, although their evidence was contradicted, the record shows that the agents testified that Hubbard, Simonds, and Woodward were put in one cell on that Sunday night, after confessing orally, because they asked to be placed together to go over the circumstances of the dynamiting together and "get the details of their stories straight" (R. 188, 276, 326–327).

4. The brief does not give the evidence as to the manner in which petitioners were treated. It is said that "during this period the petitioners were given cold bologna sandwiches for breakfast, lunch and dinner." Rhodes, Ballew, and Queen

made no such claim on their own behalf. Simonds, Woodward, and Hubbard testified to that effect but several of the agents gave evidence that Simonds, Woodward and Hubbard had told them that the food was good (R. 188–189, 292, 325, 369); and the sheriff, his cook and two deputies testified that the same varied and substantial meals were served to the prisoners in custody and to the deputy sheriffs alike (R. 554, 566–569, 570[1]). It is said that "the petitioners * * * were denied anything to drink during protracted periods of questioning." Five of the petitioners made no such suggestion. Hubbard did (R. 207) but the agents denied that he had ever asked for a drink of water (R. 325, 360, 368, 385).

5. It is stated that the petitioners were taken before the Federal Agents and called "damn liars" and "damned lying sons of bitches." But petitioner Ballew, better informed than *amicus curiae*, testified "nobody cussed me out and I was not abused or threatened" (R. 758; cf. R. 747) and petitioner Queen made no claim of being cursed or called a liar. And, while it is true that each of the other petitioners did give testimony of being called a liar and of being cursed, it is also true that the agents who took part in the questioning specifically denied these allegations (R. 186, 276–277, 287, 292, 372, 278, 280, 295, 349, 389, 299, 360, 364, 299,

[1] In our principal Memorandum on the top line of page 16 appears a reference to page 670. In the final printing, one figure was changed; the reference should be to page 570.

324, 325, 346, 360, 801, 809). Likewise the testimony given by Woodward alone (R. 694) that Agent Plaxico had told him that the Federal Bureau of Investigation secured 98% of convictions and that he, Plaxico, would have state charges dismissed against Woodward, was denied by Plaxico (R. 791, 792). The agents also denied the petitioners' testimony that they were promised "paroles" and light sentences if they made confessions (R. 176, 291, 296, 327, 337, 388, 274, 277, 287, 295, 317, 388, 280, 295, 296, 330, 281, 324, 347, 359, 361, 371, 386, 524, 810, 518, 523, 821).

6. In our principal memorandum we have discussed the testimony as to whether or not a reduction in bail had been promised (p. 19). Agent Mann denied that he had suggested bail at $1,000 or asked that Woodward's bail be reduced (R. 388) but the presumably disinterested testimony of Commissioner Anderson may be the more persuasive (R. 217–218, 221). The agents also testified, however, that no promises of low bail were made to those petitioners who claimed there had been such an offer (R. 176, 277, 317, 337).

7. The brief states categorically that "Men thus held were told by the agents that all they had to do was 'sign this paper' to go free," and cites "R. 753; etc." Ballew gave such testimony (R. 752–753, 761) and perhaps Queen's testimony (R. 683, 684) will bear that meaning. But there is not the least warrant for stating that the other confessions were obtained by any such misrepresentation.

And, the testimony of Ballew and Queen was contradicted (R. 518, 523, 794, 820–821, 803, 812–813).

8. The brief also describes these men as "denied the right to seek advice * * * from counsel." There was conflicting evidence as to whether Simonds and Hubbard asked for and were refused counsel; each claimed to have made the request (R. 208, 229–230, 239) but the agents denied that Simonds had requested counsel and testified that Hubbard after making the request changed his mind instantly (R. 175, 290, 325, 327, 359, 368, 372, 388, 346–347, 352; cf. R. 325, 359, 368, 385). There is not one word of testimony to warrant the assertion that Woodward, Ballew, Queen, or Rhodes was refused the right to counsel prior to confessing.

9. In criticising the decision below the brief states that "It glosses over the fact that armed deputies stood by at the questionings." No reference to the record is given and we find no evidence of this fact in the record.

Respectfully submitted.

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